

LEGAL UPDATE

April 2011 By: *Joshua Zuckerberg*

NEW YORK WAGE AND THEFT PREVENTION ACT GOES INTO EFFECT THIS WEEK

Effective April 12, 2011, New York's Wage and Theft Prevention Act (WTPA) goes into effect and imposes significant new notice and disclosure requirements on all New York employers. Businesses with operations in New York should begin modifying their payroll practices immediately to ensure compliance with the following requirements:

NOTICE OF PAY RATE AND PAYDAY

Commencing April 12, 2011, Employers must furnish each newly hired employee with a detailed written notice pertaining to pay rates and paydays (the "Notice") (1) at the time of hiring, (2) on or before February 1 of each subsequent year of employment, and (3) within seven days of any change in the information contained in the Notice. This Notice must include the following:

- The rate or rates of pay and the basis of the rate, including overtime rates;
- Whether the employee is being paid by the hour, shift, day, week, salary, piece, commission, or in some other method;
- Allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances;
- The regular pay day designated by the employer;

- The name of the employer, and any "doing business as" names used by the employer;
- The physical address of the employer's main office or principal place of business and the mailing address, if different; and
- The telephone number of the employer.

Employers must provide this Notice in English and in the language identified by the employee as his or her primary language at the time of hiring. To assist employers, the New York State Department of Labor (NYSDOL) has now provided model notices and guidance on its website at:

www.labor.ny.gov/workerprotection/laborstandards/workprot/lshmpg.shtm

The employee must (1) sign and date a written acknowledgment of receipt of the Notice each time that the employer provides the employee with it, (2) affirm that he or she identified his or her primary language to the employer, and (3) affirm that he or she received a copy of the Notice in his or her primary language. The Notice can be provided electronically as long as the employee can acknowledge receipt of the Notice and print a copy. The required written acknowledgments must be retained for six years.

The WTPA requires that employers provide the same Notice to all current employees (not just new hires) by February 1, 2012, and by February 1 in every subsequent year.

WAGE STATEMENTS

Wage statements, which are provided to employees with their paychecks, must now include, at a minimum, the following information:

- The dates of work covered by the wage payment;
- The name of the employee;
- The name, address and telephone number of the employer;
- The rate or rates of pay and basis thereof;
- Whether the employee was paid by the hour, shift, day, week, salary, piece, commission or other;
- Gross wages;
- Deductions;
- Allowances (if any claimed as part of the minimum wage); and
- Net wages.

Employers should pay special attention to the additional requirements for the wage statements of non-exempt employees, which must include: **the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked; and the number of overtime hours worked.** If the employee is paid on a piece rate, the statement must include the applicable piece rate or rates of pay and the number of pieces completed at each piece rate.

RETENTION OF PAYROLL RECORDS

Employers must maintain all payroll records for six years.

PENALTIES FOR NONCOMPLIANCE

An employer that fails to provide the required Notice within 10 business days of an employee's hire date is subject to an action for damages of \$50 per workweek, up to a maximum of \$2,500, plus costs, attorneys' fees and injunctive relief. Also, employers that fail to provide employees with the required information in each wage statement will be penalized \$100 for each week, up to \$2,500, plus costs, attorneys' fees and injunctive relief.

Of significance, the WTPA also increases the potential fines and damages that may be recovered for other violations of the Labor Law – which is likely to increase the number of claims. These include:

- A mandatory assessment of "liquidated damages" for successful wage claims (unless the employer can establish a good faith basis for its belief that its actions complied with the law) equal to 100% of unpaid wages (up from 25%) in private civil actions;
- Interest from the date of the underpayment to the date of payment;
- Additional penalties for employers who fail to comply within 90 days of final judgments or court orders equal to 15% of the amount of the total judgment due and owing; and
- Substantial increases in the criminal penalties and fines for failure to pay minimum wage or overtime compensation, as well as for failure to keep proper records.

INCREASED FOCUS ON RETALIATION ACTIONS

The WTPA also expands the protections afforded to employees who claim to be subjected to retaliation for exercising their rights under the New York State Labor Law. As overhauled, Labor Law section 215 shall, in addition to its other protections, prohibit employees from being retaliated against because of any complaints to any person (including, but not limited to, the employer, the Commissioner of Labor, or the attorney general) "that the employer has engaged in any conduct that the employee, reasonably and in good faith, believes violates any provision of this chapter, or any order issued by the commissioner." The revised statute shall also protect employees from retaliation because of any such complaints that the employer believes the employee made, whether that belief is accurate or not, or because the employee is about to institute a proceeding under the Labor Law. The WTPA expands the civil and criminal penalties for employers who retaliate against employees under the New York State Labor Law.

CONCLUSION

It is anticipated that the WTPA will lead to increased activity by the New York State Department of Labor and plaintiffs' attorneys. It is therefore recommended that employers of all sizes consult with counsel to ensure that they are compliant with the WTPA.

The foregoing is merely a discussion of The New York Wage and Theft Prevention Act. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Joshua Zuckerberg at (212) 326-0885, jzuckerberg@pryorcashman.com.

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ABOUT THE AUTHOR



JOSHUA ZUCKERBERG

Partner

Direct Tel: 212-326-0885

Direct Fax: 212-798-6379

jzuckerberg@pryorcashman.com

Joshua Zuckerberg has been with Pryor Cashman since 2000 and became a partner in January 2007. His practice covers the entire spectrum of labor and employment issues. He has extensive experience representing and counseling employers on all matters affecting the workplace, including discrimination, harassment, and disability claims, restrictive covenants, wage and hour issues, and termination and severance practices.

In addition, Mr. Zuckerberg represents employee associations whose membership includes physicians, professors, stage directors and fire officers. Mr. Zuckerberg has developed considerable expertise in arbitration, mediation, collective bargaining, and federal and state litigation.

Mr. Zuckerberg is a 1997 graduate of Brooklyn Law School, where he was a member of the Brooklyn Journal of International Law and the Moot Court Honors Society. He was awarded an Edward V. Sparer Public Interest Law Fellowship.